

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

ELIJAH BURTON,  
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,  
Agency.

DOCKET NUMBER  
SF-0752-98-0707-I-1

DATE: August 5, 1999

Elijah Burton, Hollywood, California, pro se.

Gail Powell, Long Beach, California, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Susanne T. Marshall, Member

**OPINION AND ORDER**

¶1 The appellant has filed a timely petition for review of the November 30, 1998 initial decision that dismissed his appeal as untimely. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal to the Western Regional Office for further adjudication.

**BACKGROUND**

¶2 The agency removed the appellant from his position as a GS-3 Office Automation Clerk effective May 15, 1998. Appeal File, Vol. II, Tab 8 at 10-11 (Subtab 2). In its removal notice, the agency advised the appellant of his right to appeal to the Board, and also advised him of the time limit for doing so. *Id.* The

appellant initiated his appeal to the Board on August 22, 1998, through a submission of several hundred pages. Appeal File, Vols. I and II, Tab 1. In his acknowledgment order, the administrative judge advised the appellant that the appeal appeared to have been filed late. He ordered the appellant to file evidence and argument showing that the appeal was timely filed or that good cause existed for the delay. In his lengthy and disorganized response, the appellant described his recent dealings with the agency, which included a civil action he had filed in the United States District Court for the Central District of California. He stated that it had been difficult for him to obtain necessary documentation from the agency, and that he had finally filed his petition for appeal without it. Appeal File, Vol. II, Tab 3 at 6. He further stated that the agency's treatment of him had made him sick, to the point where he could not work there anymore, that he has been under medical care, and that his depression and anxiety prevented him from getting his appeal in on time.

¶3 The administrative judge then issued an order stating that "If the appellant is stating that he was too ill to file a Board appeal, the appellant has the burden of showing that he was incapacitated from filing the appeal and document and show when the incapacity began and ended." Appeal File, Vol. II, Tab 4. In his response, filed September 17, 1998, the appellant described his medical history. Among other things, he noted that he had received several prescriptions for a heavy sedative (trazodone), most recently on July 28, 1998. Appeal File, Vol. II, Tab 5 at 18. He submitted a form, completed by Dr. William Leader, and dated July 28, 1998, stating that he was temporarily disabled, was unable to work, and that the situation was expected to end on November 1, 1998. Appeal File, Vol. II, Tab 5, Ex. 25 at 1. He also submitted copies of prescription information, showing that he was prescribed trazodone for insomnia and depression on January 16, 1998, March 30, 1998, July 13, 1998, and on July 28, 1998. Appeal File, Vol. II, Tab 5, Ex. 25 at 2. In describing his condition, the appellant stated that for 14

consecutive months, he had to stay heavily sedated in order to sleep and keep the anxiety and depression away, and that it was extremely difficult to go without the medication for 1 or 2 days to clear his head to get something done. He further stated that he stayed on the heavy medication from "May 1997 to present day (sic)." Appeal File, Vol. II, Tab 5 at 18.

¶4 The agency submitted its response to the administrative judge's acknowledgment order (and any relevant subsequent orders) on November 25, 1998, approximately 2 months late. Appeal File, Vol. II, Tabs 7 and 8. In its response, the agency moved to dismiss the appeal as untimely. A few days later, the administrative judge issued the initial decision dismissing the appeal as untimely. In doing so, he found that the appeal was filed about 68 days late, and that the appellant's alleged need for additional documents did not establish good cause. He further found that the medication that the appellant claimed he was taking had not precluded him from filing "numerous" other complaints since 1994, and had not stopped him from filing motions and appearing in the United States District Court "at the exact time when he should have been pursuing his Board appeal." Initial Decision (ID) at 4. The administrative judge also found it significant that the appellant was able to promptly respond to his orders since filing the appeal, despite the fact that he was still on the medication. Accordingly, he found that the appellant had not established that he was incapacitated from filing.

¶5 On petition for review, the appellant argues that the one or two-page motions that he filed in the District Court do not compare to his 300-page appeal, which took much more time and energy to file. He contends that he told the Board (presumably the administrative judge) that he stopped taking medication in order to get some work done. He further states that since the deadline for filing his Board appeal, he filed only one request, to "OGC" and two "appeals," and that it took only 6-7 minutes to complete these three documents. PFR at 18. He argues

that the agency denied him documents which he needed, and that the administrative judge improperly denied him the opportunity to respond to the agency's motion to dismiss the appeal. He supports his petition with several hundred pages of documents, including another copy of the July 28, 1998 form from Dr. Leader, and a similar form, dated November 30, 1998, showing that Dr. Leader found the appellant to be disabled on that date because of major depression, with the disability expected to last until May 1, 1999. Dr. Leader again prescribed trazodone for the appellant. Petition for Review File, Tab 1, Ex. 16. The agency has not responded to the petition for review.

### ANALYSIS

¶6 A petition for appeal must be filed within 30 days after the effective date of the action being appealed. *See* 5 C.F.R. § 1201.22(b); *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 436 (1998). Here, the appellant filed his petition more than 2 months after the 30-day time period elapsed. In order to establish good cause for the delay, and thus obtain a waiver of the time limit, he must show that he acted with due diligence under the circumstances of the case, or that the delay was due to circumstances beyond his control. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

¶7 The appellant claims that the medical conditions of depression and anxiety prevented his timely filing. To establish that the untimely filing was the result of his illness, the appellant must: (1) Identify the time period during which he suffered from the illness; (2) submit medical or other supporting evidence showing that he suffered from the illness during that time period; and (3) explain how the illness prevented him from timely filing his appeal or a request for an extension of time. *See Lacy*, 78 M.S.P.R. at 437. Contrary to the administrative judge's belief, the appellant need not establish that he was "incapacitated," but is required only to explain why his alleged illness impaired his ability to meet the Board's filing limits or seek an extension of time. *See Lacy*, 78 M.S.P.R. at 437,

n.\*. Further, the appellant was entitled to receive notice of these requirements, which the administrative judge did not provide. *See Smith v. Merit Systems Protection Board*, 168 F.3d 1305, 1307 (Fed. Cir. 1999).

¶8 Moreover, although a general claim that additional, unspecified documents are needed does not establish good cause for waiver of the time limit, *see Holt v. U.S. Postal Service*, 36 M.S.P.R. 240, 242 (1988), to the extent that the appellant is claiming that the agency had medical records that support his request for a waiver of the time limit, he may be entitled to have such documents considered in light of the *Lacy* criteria. *See Smith*, 168 F.3d at 1307. In fact, the agency is obligated to file whatever evidence it has concerning timeliness. *See Williams v. Equal Employment Opportunity Commission*, 75 M.S.P.R. 144, 149 (1997).

¶9 In any event, although the appellant continues to argue that he needs additional documents, the record does include some documentation of his illness, such as the forms completed by Dr. Leader. We find that these forms, along with the evidence that the appellant received repeated prescriptions for trazodone, do establish that the appellant was diagnosed with depression or anxiety, and was being treated for it. It is not clear to us that this evidence is clearly outweighed by the fact that the appellant was able to pursue his claims in other venues.

¶10 Because the appellant lacked a meaningful opportunity to address timeliness, we must remand the appeal to permit one. *See, e.g., Klages v. Department of Defense*, 80 M.S.P.R. 594, 597 (1999). In this regard, he should be given another opportunity to request a hearing. In any event, on remand, the appellant is to be given specific notice of the *Lacy* requirements, and to be given a reasonable opportunity to respond with information relevant to the question of timeliness. He should be instructed to file organized and clear submissions, limited to the issue at hand.

¶11 If the agency has relevant information which it has failed to provide, it must submit it. If the appellant shows good cause for the untimely filing of his appeal,

the administrative judge shall adjudicate his claim on the merits, after resolving any jurisdictional issue. *See Klages*, 80 M.S.P.R. at 597.

ORDER

¶12 This appeal is hereby remanded to the Western Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

\_\_\_\_\_  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.